

Program Materials

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California Nonprofit and Consumer Cooperative Corporations:

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Designated Directors

- I. Provisions for Designation or Selection.
- A. All nonprofit or consumer cöoperative corporations must have a board of directors (5210¹, 7210, 9210 and 12350.)
 - B. The first directors are named in the articles or are selected by the incorporator(s) (5134, 7134, 9134 and 12316) after adopting enough bylaws to provide for a board and related organizational matters.
 - C. The general rule for selection of subsequent directors is election by members, if any, or, if none, by the board.
 - D. However, the articles or a bylaw adopted by the members or, if none, the board (5310(b), 7310(b), 9310(b) and 12360(d)) may provide that all or any directors shall hold office by designation or selection as provided in the articles or bylaws rather than by election (“designated director” or “designee”) (5220(d), 7220(d), 9220(a) and 12360(d)).
 - 1. Designation can be accomplished in the Articles or bylaws by naming in them the designee(s), her or his term of office and any other necessary or desired details, or
 - 2. Designator(s) can be identified in articles or bylaws along with necessary or desired details.
 - E. A designated director holds office for a term specified in the articles or bylaws or, if they do not specify a term, until removed or the relevant article or bylaw is amended or repealed (5220(d), 7220(d) and 12360(d)).
 - F. Such a bylaw provision can only be amended or repealed by the members (5220(d), 7220(d), and 12360(d) or, if none, the board (5310(b) and 7310(b)). But the bylaws or articles could also provide that a designator must consent to amendment or repeal of the provision (5150(d), 7132(c)(5), 7150(d) and 9132(b)(4)).
 - G. Note: The Religious Corporations Law only generally authorizes designations of directors (*see* 9220) and does not include all of the other specific provisions set forth *above*.

¹ Number references are to Corporations Code sections unless otherwise specified. Numbers beginning with 5 are to Public Benefit Corporation Law, with 7 are to the Mutual Benefit Corporation Law, with 9 are to the Religious Corporation Law and with 12 are to the Consumer Cooperative Corporation Law. Absence of one of these numbers as to one of these Laws means there is no directly corresponding section in that Law. Relevant portions of these sections are in pages A-1 through A-6 *below*.

- H. Bylaws can provide for qualifications for eligibility to serve as director (5151(c)(3), 7131(c)(3), 9151(c)(3) and 12331(c)(3)). Such a provision could be used to limit the options of a designator.

II. Rights and Duties of Designated Director.

- A. As a director, a designee would have all rights, duties and liabilities of any director.
- B. Duty is of loyalty and care to the corporation (5230 et seq., 7230 et seq., 9240 et seq. and 12370 et seq.)). A designated Director could present views and interests of designator to board but ultimate duty is to act in the corporation's best interests.
- C. Rights to vote, have access to records, etc., are same as other directors.
 - 1. Rights to indemnification also the same (5237, 7238, 9246 and 12377), but
 - 2. A designated director can be indemnified by designator by contract (5237(g), 7238(g), 9246(g), and 12377(g) and probably should request that.
- D. A designated directorship could be given special attributes. *E.g.*:
 - 1. Designee required for quorum.
 - 2. Designee's approving vote required for board actions.
 - 3. Designee given right to call meetings: directors; members (if any).
 - 4. Right to designate successor (if designator not given that right or bylaws don't otherwise cover succession).
 - 5. Right to require special reports.
 - 6. Right to be member of Committee(s).
- E. 5239, 7131.5, 9247 limiting liability of volunteer director would apply (no similar provision re consumer cooperatives.)

III. Who can be designated. *E.g.*:

- A. Person named in articles or bylaws as director would be a designated director. In this case, unless otherwise provided in Articles, director would serve for term later specified in by laws.
- B. Person holding specified position or office "ex officio" can be designated a director.

1. Special rules would apply to removal or succession.
 - C. Only a natural person (a director must be a natural person (5047 (section covers all three Nonprofit Corporation Laws) and 12233)).
 - D. Others meeting qualifications, if any, required of directors.
- IV. Who can designate: nearly anyone or group, especially:
- A. A founder(s).
 - B. A head organization, controlling or parent body.
 - C. A member or members (other than all or all of a class; all members normally elect members and a class can be given a class right to do so).
- V. Removal of designated director:
- A. Members or board (if no members) can remove any or all directors without cause (5222, 7222, 9222, and 12362) but
 1. Consent of designator required for removal of designated director (5222(f)(2), 7222(f)(2), 9222(f)(2)); but if so removed designee apparently can't be redesignated (5222(f)(2)).
 2. In public benefit and mutual benefit corporation: if different person may be designated after removal of incumbent designee, that person is to be designated as director (5222(e), 7222(f), 9222(e), and 12362(f)); and
 3. In consumer cooperative corporation, article or bylaw provision for designated directors must provide for their removal and they can only be removed as so provided (12362(g)).
 - B. Can be removed for cause (5221(a), 5223, 7221(a), 7223, 9221(a), 9223, 12361 and 12363*).
 1. If removed for cause, can't be redesignated but a successor could be designated if so provided (5222(e)(1), 7222(e)(1) and 12362(f)(i)).

* These sections deal respectively with vacancies and removal by superior court.
 - C. By designator: 5222(f)(2), 7222(f)(2) and (if, so provided in articles or bylaws) 12362(g).
 - D. Director designated in articles or bylaws can be removed by amendment or repeal of relevant provision. *See I.F. above.*

- VI. Role of Bylaws (or Articles) re Designation of Directors: some suggestions:
- A. May be preferable to use bylaw provision.
 - 1. Relative privacy of bylaws.
 - B. Need to specify term of designee, *e.g.*:
 - 1. Until replaced by designator.
 - 2. For term of years.
 - 3. Term of “ex officio” designee inherently limited to incumbency in office, but useful to say so and that directorship becomes vacant until there is a successor in that office.
 - 4. If directors named in articles, *see I.B. above*.
 - 5. Any special rights of designee.
 - C. If designated directorship is to be terminated, provide for circumstance of termination and what happens to the vacated seat, *e.g.*: number of directors reduced; vacancy created filled by members or by board.
 - D. Provide for designator’s (or someone’s) right to designate successor designee upon death, disability or resignation of designee unless designated directorship to cease, as to which *see C. above*.
 - E. If designator a natural person:
 - 1. Provide for successor upon death, resignation, etc. of designator, or manner in which successor designator to be selected, or that designation right terminates or other agreed upon procedure.
 - F. If designator not a natural person(s), provide for:
 - 1. How it notifies corporation of action and who is to act for it.
 - 2. Corporation’s right (and duty) to rely on proper notification.
 - 3. Effect of change in designator (merger, change to different form, dissolution, cessation to exist, etc.) on designation right.
 - G. If designator is more than one person, (*e.g.*: cofounders of corporation, two or more members, but not all members or a class) provide for rules designators to follow in acting as such and how to notify to corporation as to actions taken.

- H. What happens if a fixed term expires or the designated position otherwise becomes vacant and the designator takes no action, *e.g.*, designator:
 - 1. Can't be located.
 - 2. Exists but doesn't/won't act because of internal problems or otherwise.
 - 3. Is natural person and is convicted of crime, etc.
- I. Possible problems where two or more directors are designated by different persons, *e.g.*:
 - 1. Try to avoid special rights that could create deadlock.
 - 2. Where designated directors have special rights and act inconsistently.

Delegation by Board of Directors

I. Sources of power to delegate.

- A. Subject to various limitations, the activities and affairs of corporation shall be conducted and all corporate powers exercised by **or under (emphasis added)** direction of the Board (5210, 7210, 9210(a) and 12350).
- B. Board may delegate management of its activities to any person or persons, management company or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers exercised under ultimate direction of board (5210, 7210, 9210(b) and 12350).
 - 1. Any delegation must remain subject to ultimate control of the board and care should be taken to exercise that control by careful selection of delegate(s); requiring reports to board; stating any appropriate duties, powers, limits, etc.
 - 2. Delegation to committees is not limited to committees composed only of directors (“committee **however composed**” (emphasis added)).
 - 3. Sections cited do not in terms limit what can be delegated to a committee but committee cannot be delegated any of the matters as to which board committees are restricted (5212(c), 7212(c), 9212(c) and 12352(c)) (*See C. below*).

C. Delegation to Board Committees.

- 1. Board may create committees consisting of directors and delegate to them all authority of the Board with a number of specified exceptions (5212(a), 7212(a), 9212(a) and 12352(a)).
 - a. If Board proposes to rely on actions of a committee, the committee must act within its designated authority and the director must believe the committee merits confidence (5231(b)(3), 7231(b)(3), 9241(b)(3) and 12370(b)(3)).
 - b. In addition the Board must limit exercise of its authority by a committee to the ultimate direction/control of the board (*See B. above*).

D. Delegation to non Board Committees.

- 1. Committees not consisting only of board members may be created as mentioned in C. *above* for advisory or other purposes but probably cannot be delegated “all authority of the board” even apart from the stated exceptions as to delegations.

E. Delegation to Officers.

1. Board can manage activities and affairs of corporation itself but generally boards should oversee management and affairs through delegation as mentioned *above* and through officers or others.
2. President (or if none, chair of board) is “general manager and chief executive officer” unless otherwise provided in articles or bylaws (5213(a), 7213(a), 9213(a) and 12353(a)).
3. In so acting, president will generally sub delegate many duties to other officers or employees of corporation and to some extent others under contract with corporation.
4. In acting, president and officers remains subject to ultimate direction and control by the board (*See I.A. above*).

F. Inherent power of delegation.

1. Since a corporation in carrying out its activities has “all of the powers of a natural person” (5140, 7140, 9140 and 12320), it would appear that a corporation has the same power and right to delegate its management and activities, subject to limitations in the applicable Law, articles or bylaws, as a natural person.
 - a. This is an inherent power conferred by the laws on corporations and goes beyond the specific sub powers listed in the relevant statutory sections.

Alternate Directors (a good idea?)

- I. Nonprofit Corporation Law doesn't seem to provide for them.
 - A. Law doesn't refer to them.
 - 1. Law does specifically allow directors to be alternate members of board Committees (5212(c), 7212(a), 9212(a) and 12352(a)).
 - B. Such directorships probably are not implied or inferable from Law's provisions.
 - 1. Provisions re committees (*see* A.1. *above*) suggest drafters knew how to provide for alternate members of bodies.
 - 2. Definition of "Directors" doesn't seem to include alternates (5047); Consumer Cooperative Corporation Law definition does include them (12333) and Law refers to them (*see* II. *below*). That Law is modeled on Mutual Benefit Corporation Law except where different rule was intended; difference as to alternate directors was suggested to drafting committee by lawyer members with cooperative corporation clients.
- II. Consumer Cooperative Corporation Law does permit alternate directors.
 - A. Definition of "director" includes them (12233).
 - B. Bylaws may provide for them (12331(a)).
 - 1. If so, bylaws must specify manner and times of their election and the conditions to their service in place of a director (12331(a)).
 - C. These provisions pretty vague as to details.
 - 1. Perhaps they should be augmented. *See* V *below*.
 - D. Other provisions as to directors do not differentiate between non-alternate ("full fledged") and alternate directors.
 - 1. Question: Are there (should there be) differences in their required duties and their liabilities? If so, should Law deal with them?
- III. Nonprofit Corporation Laws of some other jurisdictions provide for alternate directors; *e.g.*:
 - A. New York Not-for-Profit Corporation Law, § 703(d) provides that the certificate of incorporation or bylaws may provide that a special district or membership section entitled to elect one or more directors may also elect an alternate for each such director. In the absence of such director, the alternate may attend meetings and exercise the rights of the absent director and when doing so is subject in all

respects to the provisions of the law governing directors. *See* page B-1 of Supplementary Materials.

- B. The Pennsylvania Corporations Code has a similar provision for business and nonprofit corporations. *See* page B-2 of Supplementary Materials.
- C. English Law also provides for them. *See* page B-4 of Supplementary Materials.

IV. Should Nonprofit Corporation Law provide for/permit alternate directors?

- A. It seems desirable if one or more directors are elected or appointed by a specific group of members or others than the members or board as a whole where electing or appointing body wants to insure representation at meetings and other functions of the board.
- B. Even if some persons or group other than the members or a class of members or board as a whole does not have right to elect directors, it may be desirable to assure a pool of qualified persons to act as alternate directors so that the corporation can be assured that the board will be able to operate at full strength of numbers at all times.
- C. However, the Law and enabling articles or bylaws need to be carefully drawn; *e.g.*:
 - 1. Confusion must be avoided as to which alternates are to step in and when they do so.
 - 2. The rights and duties of an alternate while not serving as a director need to be clear as to such things as access to records and receipt of notices of meetings, notices to an alternate to replace a director, etc.
 - 3. Similarly, the degree to which liabilities of directors attach to alternates must be clear.
 - 4. Care must be taken to insure that alternates while not acting as such are kept adequately informed of the affairs of the corporation (and understand that they must be so) so as to adequately assure their competence to act as directors if that occurs.
 - 5. These requirements can be difficult to meet.

V. If alternate directors in nonprofit corporations are to be permitted, what provisions of the Laws or bylaws are desirable? Following are possible exemplars:

- A. Articles. The Law might provide as follows:

1. Section 5210.5* Alternate Directors:

“The articles or a bylaw adopted by approval of the members (Section 5034) may provide for alternates to serve as directors in the absence or unavailability of one or more directors. Such provision shall set forth: how alternates are to be elected, appointed or selected; their rights and duties when incumbent as alternates but not serving as directors; and, when alternates are serving as directors, how vacancies in an alternate directorship shall be filled. An alternate while serving as a director shall have all rights and duties of a director and shall have the liabilities of a director. References to “director(s)” in this Law include alternates when so serving.

2. An additional sentence should be added to Section 5047, “Directors” reading either: “Directors” also means alternate directors described in Section 5210.5 or (and possibly better) “Directors” also means alternate directors described in Section 5010.5 when serving as directors.

- a. Note that when there are no members matters that would otherwise require approval by the members require only approval of the board (5310(b), 7310(b), 9310(b)(1)).

VI. Possible Bylaw provisions.

A. Section ____ Alternate Directors.

1. Election, appointment or selection. [Name or description of group entitled to elect or appoint one or more alternate directors; provision as to election or appointment of directors needs to cover this] shall be entitled to elect or appoint one or more persons to serve as an alternate(s) for each director /it/they are entitled to elect or appoint and, if more than one alternate is so elected or appointed, shall provide for the order in which they shall serve as alternates. A person entitled to designate or select one or more directors pursuant to Corporations Code Section 5220(d) shall also have the right to select one or more alternates and if more than one alternate is selected shall specify the order in which the alternates shall serve as directors.
2. Qualifications. An alternate shall have the same qualifications as, and his or her service shall be during the time, the director in whose place the alternate may serve is absent or temporarily unavailable to serve.

* and corresponding sections in the other three Laws.

3. Notices, etc. When serving as an alternate, the person/shall be/shall not be/* entitled to receive copies of notices and other materials sent to directors.
4. Notices to and by Alternates. If a director plans to be or is absent from or temporarily unavailable to attend a meeting, he or she shall give as much notice as is practicable to the secretary of the corporation and designate the relevant alternate who may go in his or her place. If no such notice is given by a director but he or she does not attend a meeting, the Secretary may notify the appropriate alternate to attend and if practicable the alternate shall do so. The secretary shall advise such alternate at the same time as notice is given to directors of the meeting or as soon as practicable thereafter that the alternate shall serve in place of the director.
5. Quorum. When serving as a director, an alternate shall be considered for purposes of determining a quorum and may act as a member of any committee of which the absent or unavailable director is a member.
6. Other matters. If a director knows he or she will not be able to take some directorial action other than attendance at a directors' meeting, he or she may designate an alternate to do so and shall timely advise the secretary of the corporation of such substitution.

* Choose one.

VII. Possible Non-Statutory Substitute for Alternate Directors.¹

A. Nominations

1. If directors are elected by members as a whole, by classes of members or by districts or other groups or persons, as to each group entitled to elect directors, provide for more nominees than vacancies to be filled by that group or persons(s). Also specify the order in which non-elected nominees who meet qualifications for directorship shall serve to fill vacancies when elected director becomes temporarily absent or unavailable.
2. As to designated director(s) (*see I above*), consider providing in bylaws for substitute designee and terms of service.

¹ Thanks to John Caragozian, General Counsel of Sunkist Growers, Inc., the Bylaws of which provided me ideas for this Section.

- B. Substitute serving as alternate director; provide in bylaws:
1. That if director temporarily is absent or unavailable for meeting or other director action, he/she is deemed to resign and next available alternate is deemed elected by board to fill vacancy.
 2. That when director becomes available, alternate deemed to resign and director deemed reelected to fill vacancy.
 3. That if elected director becomes permanently unable to serve or is removed for failure to attend meetings or otherwise, board fills vacancy as prescribed for vacancies in board.

Relevant Statutory Provisions in California Nonprofit Corporation Law

Provisions Relevant to Director Designation By Third Person Using Public Benefit Corporation Law Sections as Exemplar.

Provision for Director designations.

Provisions For Directors and Management

§ 5210.* Each corporation shall have a board of directors. Subject to the provisions of this part and any limitations in the articles or bylaws relating to action required to be approved by the members (Section 5034), or by a majority of all members (Section 5033), the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board. The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board. Sections 7210.9 and 12350 are essentially identical.

* §§ 77210, 9210 and 12350 are essentially the same except that 9210 is subject to other provisions of the Law and to articles and bylaws.

§ 5310.*

...

- (b) In the case of a corporation which has no members, in any action for which there is no specific provision of this part applicable to a corporation which has no members and which would otherwise require approval by a majority of all members (Section 5033) or approval by the members (Section 5034) shall require only approval of the board, . . .

* Sections 7310(b) and 9310(b) are essentially the same.

§ 5220.

- (d) Subdivisions (a) through (c)¹ notwithstanding, all or any portion of the directors authorized in the articles or bylaws of a corporation may hold office by virtue of designation or selection as provided by the articles or bylaws rather than by election by a member or members. Those directors shall continue in office for the term prescribed by the governing article or bylaw provision, or, if there is no term prescribed, until the governing article or bylaw provision is duly amended or repealed, except as provided in subdivision (e) of Section 5222. A bylaw

1. Subdivisions (a) - (c) cover election of directors for term of office; continuance in office until successor in place; permitted election of directors by classes of members.

provision authorized by this subdivision may be adopted, amended, or repealed only by approval of the members (Section 5034), subject, if so provided in the bylaws, to the consent of the person or persons entitled to designate or select the director or directors.

Provision that bylaws may impose requirements as to director's qualifications for office (emphasis added).

§ 5151.

...

(c) The bylaws may contain any provision, not in conflict with law or the articles, for the management of the activities and for the conduct of the affairs of the corporation, including but not limited to:

...

(3) The **qualifications** [emphasis added], duties and compensation of directors; the time of their election; and the requirements of a quorum for directors' and committee meetings.

Definition of "Director"

§ 5047.* Except where otherwise expressly provided, "director" means natural persons, designated in the articles or bylaws or elected by the incorporators, and their successors and natural persons designated, elected or appointed by any other name or title to act as members of the governing body of the corporation.

* Definition applies to public benefit, mutual benefit and religious corporations.

§ 12233 is the same except for added last sentence: " 'Directors' also means alternate directors described in Section 12331."

Provision allowing requirement of designator's consent to amendment of bylaw provision as to designation of director.

§ 5150.

...

(d) Bylaws may also provide that repeal or amendment of those bylaws, or the repeal or amendment of specified portions of those bylaws, may occur only with the approval in writing of a specified person or persons other than the board or members.

Provision allowing bylaws to provide for special quorums or director votes (emphasis added).

Provision allowing special quorums or voting power.

§ 5211.(a) **Unless otherwise provided in the articles or in the bylaws** [emphasis added], all of the following apply:

...

(7) A majority of the number of directors authorized in the articles or bylaws constitutes a quorum of the board for the transaction of business. The articles or bylaws may not provide that a quorum shall be less than one-fifth the number of directors authorized in the articles or bylaws, or less than two, whichever is larger, unless the number of directors authorized in the articles or bylaws is one, in which case one director constitutes a quorum.

(8) Subject to the provisions of Sections 5212, 5233, 5234, 5235, and subdivision (e) of Section 5238, an act or decision done or made by a majority of the directors present at a meeting duly held at which a quorum is present is the act of the board. The articles or bylaws may not provide that a lesser vote than a majority of the directors present at a meeting is the act of the board. A meeting at which a quorum is initially present may continue to transact business notwithstanding the withdrawal of directors, if any action taken is approved by at least a majority of the required quorum for that meeting, or a greater number required by this division, the articles or bylaws.

...

Provisions permitting delegations.

§ 5140. Subject to any limitations contained in the articles or bylaws and to compliance with other provisions of this division and any other applicable laws, a corporation, in carrying out its activities, shall have all of the powers of a natural person, including, without limitation, the power to: Sections 7140, 9140 and 12320 are essentially identical.

...

§ 5213. A corporation shall have a chairman of the board or a president or both, a secretary, chief financial officer and such other officers with such titles and duties as shall be stated in the bylaws or determined by the board and as may be necessary to enable it to sign instruments. **The president, or if there is no president the chairman of the board, is the general manager and chief executive officer of the corporation, unless otherwise provided in the articles of bylaws** [emphasis added]. Any number of offices may be held by the same person unless the articles or bylaws provide otherwise, except that neither the secretary nor the chief financial officer may serve concurrently as the president or chairman of the board.

...

See also § 5210 above.

General standard of good faith (loyalty) and care for directors.

§ 5231. Good faith; standard of care; reliance on information presented by others; liability

(a) A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonably inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

(b)(3) A committee of the board upon which the director does not serve as to matters within its authority, which committee the director believes by merit confidence. Sections 7231(b)(3), 9241(b)(3) and 12370(b)(3) are essentially identical.

...

(c) Except as provided in Section 5233, a person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director, including, without limiting the generality of the foregoing, any actions or omissions which exceed or defeat a public or charitable purpose to which a corporation, or assets held by it, are dedicated.

Removal of designated director.

§ 5222. Removal without cause; procedure

(a) Subject to subdivisions (b) and (f), any or all directors may be removed without cause if:

[(a)(1) and (a)(2) cover removal by members; (a)(3) covers removal by majority of directors.]

[(b), (c) and (d) cover other matters re removal.]

....

(e) If a director removed under this section or Section 5221¹ or 5223² was chosen by designation pursuant to subdivision (d) of Section 5220, then:

(1) If a different person may be designated pursuant to a governing article or bylaw provision, the new designation shall be made.

(2) If the governing article or bylaw provision contains no provision under which a different person may be designated, the governing article or bylaw provision shall be deemed repealed.

(f) If by the provisions of the articles or bylaws a person or persons are entitled to designate one or more directors, then:

(1) Unless otherwise provided in the articles or bylaws at the time of designation, any director so designated may be removed without cause by the designating person or persons.

(2) Any director so designated may only be removed under subdivision (a) with the written consent of the designating person or persons.

1. Declaration of vacancy because of unsound mind.

2. Removal by Superior Court for cause.

§ 5224. Vacancies; filling; effective date of resignation

(a) Unless otherwise provided in the articles or bylaws and except for a vacancy created by the removal of a director, vacancies on the board may be filled by approval of the board (Section 5032) or, if the number of directors then in office is less than a quorum, by (1) the unanimous written consent of the directors then in office, (2) the affirmative vote of a majority of the directors then in office at a meeting held pursuant to notice or waivers of notice complying with Section 5211, or (3) a sole remaining director. Unless the articles or a bylaw approved by the members (Section 5034) provide that the board may fill vacancies occurring in the board by reason of the removal of directors, or unless the corporation has no members pursuant to Section 5310, such vacancies may be filled only by approval of the members (Section 5034).

Provision in Religious Corporation Law re selection or designation of directors.

§ 9220. Provision in articles or bylaws; term generally

(a) The articles or bylaws may provide for the tenure, **election, selection** [emphasis added], designation, removal, and resignation of directors.

Provisions in California Consumer Cooperative Corporation Law

§ 12331- Mandatory and discretionary provisions- (a) The bylaws shall set forth (unless such provision is contained in the articles, in which case it may only be changed by an amendment of the articles) the number of directors of the corporation; or that the number of directors shall be not less than a stated minimum or more than a stated maximum with the exact number of directors to be fixed, within the limits specified, by approval of the board or the members (Sections 12222 and 12224), in the manner provided in the bylaws, subject to subdivision (e). The number or minimum number of directors shall not be less than three. Alternate directors may be permitted, in which event, the bylaws shall specify the manner and times of their election and the conditions to their service in place of a director.

§ 12233. "Directors"- "Directors" means natural persons, designated in the articles or bylaws or elected by the incorporators, and their successors and natural persons designated, elected, or appointed by any other name or title to act as members of the governing body of the corporation. "Directors" also means alternate directors described in Section 12331.

§ 12331. (a) The bylaws shall set forth (unless such provision is contained in the articles, in which case it may only be changed by an amendment of the articles) the number of directors of the corporation; or that the number of directors shall be not less than a stated minimum or more than a stated maximum with the exact number of directors to be fixed, within the limits specified, by approval of the board or the members (Sections 12222 and 12224), in the manner provided in the bylaws, subject to subdivision (e). The number or minimum number of directors shall not be less than three. Alternate directors may be permitted, in which event, the bylaws shall specify the manner and times of their election and the conditions to their service in place of a director.

(b) Once members have been admitted, a bylaw specifying or changing a fixed number of directors or the maximum or minimum number or changing from a fixed to a variable board or vice versa may only be adopted by approval of the members.

(c) The bylaws may contain any provisions, not in conflict with law or the articles for the management of the activities and for the conduct of the affairs of the corporation, including but not limited to the following.

...

Provisions in New York Not-for-Profit Corporation Law

§ 703 Election and term of office of directors; alternates

(d) If the certificate of incorporation or by-laws so provide, a special district or membership section entitled to elect or appoint one or more directors **may elect or appoint an alternate for each such director [emphasis added]**. In the absence of a director from a meeting of the board, his alternate may, upon written notice to the secretary of the corporation, attend such meeting and exercise therein the rights, powers, and privileges of the absent director. When so exercising the rights, powers, and privileges of the absent director, such alternate shall be subject in all respects to the provisions of this chapter governing directors.

Notice of meetings of the board:

. . .

(c) Notice of a meeting need not be given to any **alternate director [emphasis added]**, nor to any director who submits a signed waiver of notice whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to him.

Pennsylvania Corporations Code, Domestic Business
Corporations (15 Pa.C.S.)

§ 1725- Selection of directors:

(a) GENERAL RULE.-- Except as otherwise provided in this section, directors of a business corporation, other than those constituting the first board of directors, shall be elected by the shareholders. A bylaw adopted by the shareholders may classify the directors with respect to the shareholders who exercise the power to elect directors.

(b) VACANCIES.--

...

(c) ALTERNATE DIRECTORS.-- If the bylaws so provide, a shareholder or group of shareholders entitled to elect, appoint, designate or otherwise select one or more directors may select an alternate for each director. In the absence of a director from a meeting of the board, his alternate may, in the manner and upon such notice, if any, as may be provided in the bylaws, attend the meeting or execute a written consent and exercise at the meeting or in such consent such of the powers of the absent director as may be specified by, or in the manner provided in, the bylaws. When so exercising the powers of the absent director, the alternate shall be subject in all respects to the provisions of this subpart relating to directors.

Nonprofit Corporations Code (**15 Pa.C.S.**)

§ 5725 Selection of directors:

(a) GENERAL RULE.-- Except as otherwise provided in this section, directors, other than those named in the articles, if any, shall be elected by the members.

(b) OTHER METHODS.-- If a bylaw adopted by the members so provides, directors may be elected, appointed, designated or otherwise selected by such person or persons or by such method or methods as shall be fixed by, or in the manner provided in, such bylaw.

(c) VACANCIES.--

...

(d) ALTERNATE DIRECTORS.-- If the bylaws so provide, a person or group of persons entitled to elect, appoint, designate or otherwise select one or more directors may select one or more alternates for each such director. In the absence of a director from a meeting of the board one of his alternates may, in the manner and upon such notice, if any, as may be provided in the bylaws, attend such meeting and exercise at the meeting such of the powers of the absent director as may be specified by, or in the manner provided in, the bylaws. When so exercising the powers of the absent director, such

alternate shall be subject in all respects to the provisions of this article relating to directors.

(e) NOMINATION OF DIRECTORS.-- Unless the bylaws provide otherwise, directors shall be nominated by a nominating committee or from the floor.

United Kingdom

1. Table A of the Companies Act of 2006 (which will supersede the Companies Act of 1985, which still remains in effect for certain parts not at issue here) provides the “default model bylaws” for UK corporations. These default bylaws include many provisions on alternate directors.

2. Provisions Regarding Alternate Directors

a. 65. Any director (other than an alternate director) may appoint any other director, or any other person approved by resolution of the directors and willing to act, to be an alternate director and may remove from office an alternate director so appointed by him.

b. 66. An alternate director shall be entitled to receive notice of all meetings of directors and of all meetings of committees of directors of which his appointor is a member, to attend and vote at any such meeting at which the director appointing him is not personally present, and generally to perform all the functions of his appointor as a director in his absence but shall not be entitled to receive any remuneration from the company for his services as an alternate director. But it shall not be necessary to give notice of such a meeting to an alternate director who is absent from the United Kingdom.

c. 67. An alternate director shall cease to be an alternate director if his appointor ceases to be a director; but, if a director retires by rotation or otherwise but is re-appointed or deemed to have been re-appointed at the meeting at which he retires, any appointment of an alternate director made by him which was in force immediately prior to his retirement shall continue after his re-appointment.

d. 68. Any appointment or removal of an alternate director shall be by notice to the company signed by the director making or revoking the appointment or in any other manner approved by the directors.

e. 69. Save as otherwise provided in the articles, an alternate director shall be deemed for all purposes to be a director and shall alone be responsible for his own acts and defaults and he shall not be deemed to be the agent of the director appointing him.

Other Background Materials

Extract from Ballantine & Sterling, Ch. 19, Nonprofit Corporations

§ 405 Management: Functions of Directors and Officers

§ 405.01 Role, Selection, Tenure, and Removal of Directors

[c] **Subsequent Directors.** At the expiration or earlier termination of the terms of office of the initial directors, their successors may be chosen by members, directors, delegates, persons with authority to designate directors, or any combination of these, dependent upon the provisions of the articles or the bylaws. If a corporation has members, all of the foregoing combinations are possible, and a combination of the foregoing can include provision for the election of one or more directors by the members of a class of members voting as a class. If the corporation has no members, it will also have no delegates and subsequent directors will, therefore, be elected by the directors then in office themselves or by persons other than the directors with authority to designate directors, as discussed *below*.

Some or all of the authorized number of directors of a corporation may hold office by virtue of designation or selection as provided by the articles or bylaws rather than by election by a members or members (or directors). If the governing provision is in the bylaws, it may only be adopted, amended, or repealed by approval of the members, if the corporation has members, subject, if so provided in the bylaws, to the consent of the person or persons entitled to designate or select any director or directors. If such a governing provision is in the articles, its amendment would require the approval of the board and (if the corporation has members) of the members and also, if the articles or bylaws so provide, of the person or persons entitled to designate or select the director or directors.

Providing for a method of selection of directors other than by the members or by the directors themselves permits broad flexibility in the control, or participation in control, of a corporation. One of the simplest examples would be a corporation some or all of whose members are entitled to designate one or more directors. Rather than leaving the carrying out of such an arrangement to an agreement among members (voting agreements and voting trusts among members of public benefit corporations being unenforceable and such agreements among members of mutual benefit corporations being subject to the vagaries of the law other than the Mutual Benefit Corporation Law), provisions in the articles or bylaws could effectively provide for direct appointment of directors by the respective members. Another example might involve service as a director of one corporation, ex officio, by an officer of some other group; the designation by the other group of that officer would amount to the designation of the officer to serve ex officio on the board of the corporation and would be a form of selection or designation other than by election. Again, a parent or controlling organization may desire the right to control the composition of a subsidiary's or subordinate's board through a right directly to appoint a majority or some stated number of its directors. These and an infinite variety of similar arrangements are permitted by Corp. Code §§ 5220(d) and 7220(d). If such a method of

selecting directors other than by members or the directors themselves is adopted, the provision for that method should cover the possibility that the person or persons having the right to designate or select directors may cease to exist. The relevant coverage might, for example, provide that in that case the right to select or designate also shall cease to exist and either that the board position shall cease to exist or that an incumbent shall be elected by the same means as other directors are elected.

Robert's Rules of Order (Newly Revised)
pp. 502-504 re Alternate Delegates

Provision for alternates. To assure as complete representation at the convention as possible, the bylaws at the convention level should provide that each unit shall elect a certain number of alternates—frequently equal to the number of delegates. To maintain a uniform standard of representation, the qualifications for election as an alternate—which may include membership in good standing for a prescribed number of years—are made the same as for a delegate.

Alternates normally are elected with a designated order, in which they will be called to serve, if available, as vacancies arise in the delegation of their constituent unit. When a unit has more than one delegate, an elected alternate (other than the vice-president) is not associated with any particular delegate. The vacancy that occurs first in point of time (except one involving the president when the vice-president is able to serve in his stead) is filled by the first elected alternate or the ranking one available, and so on.

In cases where the individual delegates within a unit's delegation represent particular areas, groups, etc., it may sometimes be desirable to make exception to the foregoing rule by providing, in the bylaws at the convention level, for the pairing of each alternate with a specific delegate. The disadvantage of such a system arises when both a particular delegate and his only alternate are unable to attend the convention—thus depriving a constituent unit of part of the representation to which it is entitled.

Status and seating of alternates; replacement procedure. Alternates registered as such are usually provided with badges of a different color or shape from those of delegates and are seated in sections apart from them. (In large conventions, assigned seats in the assembly hall ordinarily can be guaranteed only to the voting body.) When an alternate is officially registered by the Credentials Committee (pp. 509 ff.) as taking the place of an elected delegate, however, he is supplied with a delegate's badge and becomes a voting delegate with the same duties and privileges as if originally so elected.

If an alternate is to replace a delegate who has registered, proper evidence of that delegate's withdrawal from such status must be presented to the Credentials Committee, and the alternate must be re-registered as the new delegate before he can sit or vote as a member of the convention. It is the duty of any registered delegate who ends his presence at the convention to see that his departure is promptly reported to the Credentials Committee, and to whatever authority is concerned with locating the proper accredited alternate if one is available. Unless the rules of the body provide otherwise, no alternate or other person can "substitute" for a delegate who remains registered. In other words, a delegate's temporary absence from the convention hall does not entitle an alternate to make motions speak in debate, or cast the delegate's vote—even with the delegate's authorization—unless a rule of the body permits this procedure.